

# **JOINT COMMITTEE ON ADMINISTRATIVE RULES**

ILLINOIS GENERAL ASSEMBLY

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REP. GREG HARRIS  
REP. LOU LANG  
REP. DONALD L. MOFFITT  
REP. ROSEMARY MULLIGAN  
REP. ANDRE' THAPEDI

## **MINUTES**

**October 11, 2011**

### **Meeting Called to Order**

The Joint Committee on Administrative Rules met on October 11, 2011 at 11:00 a.m. in Room 600C of the Michael A. Bilandic Building in Chicago, Illinois.

Co-Chair Saviano called the meeting to order and announced that the policy of the Committee is to allow only representatives of State agencies to testify orally on any rule under consideration at Committee hearings. Other persons are encouraged to submit their comments in writing.

### **ATTENDANCE ROLL CALL**

Senator Pamela Althoff	X Representative Greg Harris
X Senator Maggie Crotty	X Representative Lou Lang
X Senator Don Harmon	X Representative Donald Moffitt
X Senator John O. Jones	X Representative Rosemary Mulligan
X Senator Dale Righter	X Representative Angelo "Skip" Saviano
X Senator Ira Silverstein	X Representative Andre' Thapedi

### **APPROVAL OF THE MINUTES OF THE SEPTEMBER 13, 2011 MEETING**

Representative Harris moved, seconded by Representative Thapedi, to approve the minutes of the September 13, 2011 meeting. The motion passed unanimously.

### **AGENCY RESPONSES**

***Department of Healthcare and Family Services – Medical Assistance Programs (89 Ill. Adm. Code 120; 34 Ill. Reg. 11664)***

Representative Lang moved, seconded by Senator Crotty, that JCAR withdraw the Filing Prohibition against this rulemaking contingent upon, and effective with, the Department's filing of the rule, with the JCAR approved agreements and modifications, for adoption. The motion passed unanimously on a rollcall vote 11-0-0.

## **REVIEW OF AGENCY RULEMAKINGS**

### ***Illinois Racing Board – Medication (11 Ill. Adm. Code 603; 35 Ill. Reg. 15296) (Emergency)***

Senator Righter moved, seconded by Senator Silverstein, that JCAR object to this rulemaking because the incorporation by reference of the Association of Racing Commissioners International (RCI) Uniform Classification of Foreign Substances incorrectly cites the wrong version. Additionally, JCAR objects to the use of emergency rulemaking to remove Levamisole from the list of approved substances. RCI revised its guidelines to recommend against the use of Levamisole at least as early as 2009. If IRB had acted in a more timely manner, this use of emergency rulemaking could have been avoided. The motion passed unanimously.

### ***Department of Transportation – Prequalification of Contractors, Authorization to Bid, and Subcontractor Registration (44 Ill. Adm. Code 650; 35 Ill. Reg. 15485) (Emergency)***

Senator Crotty moved, seconded by Representative Lang, that JCAR object to DOT's use of emergency rulemaking to adopt this rulemaking because the Department has not demonstrated the existence of an emergency situation requiring the use of emergency rulemaking. PA 96-795 became effective 7/1/10, over 13 months before these emergency rules were adopted. Any emergency that exists appears to be due to the Department's delay in implementing PA 96-795. The motion passed unanimously.

## **CONSIDERATION OF OTHER RULEMAKINGS**

Co-Chair Saviano asked if any members requested consideration of any other rulemaking. Senator Harmon requested discussion of a DFPR proposal.

### ***Department of Financial and Professional Regulation – Cemetery Oversight Act (68 Ill. Adm. Code 1249; 35 Ill. Reg. 11050)***

Secretary Brent Adams represented DFPR.

Senator Harmon: Legislation on this subject remains active, and the General Assembly is convening for veto session later in October. Will DFPR agree to extend the rulemaking for an additional 45 days to allow the General Assembly time to address the underlying statute?

Secretary Adams: I am not able to agree to extend the rulemaking.

Senator Harmon: Why?

Secretary Adams: The rules have been pending in one form or another since April 2010. DFPR agreed to an Extension on the first set of rules and cooperated with the prohibition on their filing. This second attempt to implement the statute was provided to the members in the early part of this summer. DFPR believes it is time to either adopt the rules or give up on rulemaking at this time.

Senator Harmon: Is a one month Extension to permit a delayed process in the General Assembly to unfold suddenly objectionable to DFPR?

Secretary Adams: Yes it is. DFPR has been down that road before.

Senator Righter: According to my recollection, when the General Assembly was considering the bills that Senator Harmon referenced, DFPR waited to take a position on those bills.

Secretary Adams: Yes it did.

Senator Righter: What position was taken?

Secretary Adams: DFPR opposed SB 1853 and supported SB 669 and will continue to maintain those positions in the veto session. The promulgation and adoption of rules, and implementation of those rules, at this time will not interfere with legislative action during veto session.

Senator Righter: No it would not. However, some individuals, including some JCARE members, would take DFPR's opposition to at least one of the bills as trying to stand in the way of addressing the issues that need to be addressed. What is DFPR's role in alleviating those concerns and allowing the Department to move forward with its rulemaking?

Secretary Adams: In October 2010, a meeting was held, attended by affected cemeterians, Senator Crotty, Representative Saviano and Senator Burzynski, to address issues related to the Cemetery Oversight Act. At that time, it was apparent that the problems cited were statutory and not rulemaking in nature. DFPR chose not to resist a Filing Prohibition that would allow the legislature time to pass trailer legislation in the spring session. That did not happen. SB 1853 ran into a roadblock on the House side. SB 669, arguably, ran into a roadblock on the Senate side. DFPR is not in a position to agree to an Extension as it has already tried the solution that JCARE is suggesting.

Senator Righter: What is magical about the next 30 days? DFPR has taken part in the meetings, and the Secretary is aware of the hot button issues that are in play and the differences of opinion that members of the General Assembly have about how this legislation should be crafted and how it will affect different parts of the State. Given that, and the fact that progress was made in the last legislative session, what is the hang-up on this 30 days? Why has the Department drawn the line now?

Secretary Adams: Given its prior experience on this rulemaking, DFPR would not find itself in a different position in 30 days. The Department would remain in a holding pattern relative to implementing its statutory mandate. DFPR's goal is to implement the mandates that the legislature and the Governor established in early 2010. DFPR simply wants to do what the law instructs it to do, which it is overdue in accomplishing.

Senator Righter: Does the Secretary believe that the legislature will move on a piece of legislation in the first week of the fall veto session?

Secretary Adams: I have no opinion on that.

Senator Righter: You commented that nothing will change in the next 30 days. What else could you mean other than that the General Assembly will not move on a piece of legislation in the next 30 days?

Secretary Adams: I have to weigh what the Department can do with the adoption of rulemaking versus the chances that legislation will pass in November. DFPR believes that adoption of rulemaking will help move us forward relative to this issue.

Senator Righter: It is obvious you have an opinion on the likelihood that the General Assembly will do something in the next 30 days or otherwise you would not be weighing it against something else. This is a disappointing sign of inflexibility on the Secretary's part. Members of the General Assembly are trying to wade their way through a very difficult issue.

Representative Moffitt: What did the Secretary mean when you stated in opening comments that you are not in a position to agree to an Extension? Is this a self-imposed position? Is there anything else the JCAR members are failing to see? Is this a position that you yourself are taking?

Secretary Adams: My phraseology was meant to be the least confrontational possible as I do not take pleasure in failing to agree to an Extension.

Representative Moffitt: Is the Secretary aware of the precedent that, if the agency asks for an Extension, JCAR gives it, and, if JCAR asks for an Extension, agencies have cooperated?

Secretary Adams: I am aware of the precedent and that fact increases my discomfort in not agreeing to the Extension.

Representative Moffitt: Is the Secretary comfortable in breaking a precedent that has been in place for many years?

Secretary Adams: I am aware of the implications of this decision.

Representative Moffitt: Many small, rural downstate cemeteries located in towns that I and other JCAR members represent will most likely be abandoned under the regulations being implemented at this point. If there is an opportunity for legislative action, have we improved the situation when we have more abandoned cemeteries that will become the obligation of the State, as opposed to being cared for and maintained locally? I understand the Secretary's mandate to implement the law. However, JCAR members are asking for an opportunity to alleviate statutory issues impacting those cemeteries.

Secretary Adams: DFPR intends to do everything it can to prevent the abandonment of cemeteries, which is why the licensure fees for smaller cemeteries are being set at \$0, which has never been done in DFPR history. DFPR will also pay fingerprinting fees for smaller cemeteries. It is doing everything it can to alleviate the concerns of smaller cemeteries.

Representative Moffitt: The rules still include additional responsibilities, training and time commitment that may result in the State receiving more abandoned cemeteries.

Secretary Adams: I cannot predict whether there will be abandonment of cemeteries. There are cemeteries in receivership now, and the Act has not yet been implemented.

Representative Moffitt: I did not ask for a prediction. This will be the outcome. When considering whether the State will be improved or hurt, these regulations will not improve it. These regulations are in response to the actions of one large cemetery where laws were broken. If the State enforced existing laws, in all probability the problem could have been avoided. However, we could take the time to develop a law that would fit smaller cemeteries. This would be the more reasonable approach, and I ask DFPR to reconsider its position and do that.

Representative Mulligan: I represent many different types of cemeteries in my district. I cannot understand why postponing consideration would be a problem. The State is very diverse, and cemeteries serving downstate areas are different than those serving upstate areas. Cemetery sizes vary statewide. Time is needed to properly taper these regulations to fit the cemeteries. I question the Department's inflexibility in not agreeing to an Extension.

Secretary Adams: I understand your concerns but am unable to agree to an Extension.

Senator Harmon: JCAR and DFPR occupy an odd position. This problem requires a legislative remedy, and it is the fault of the legislature for not giving DFPR better guidance through subsequent legislation. I have grave concern that the inflexibility of the Department will result in no further action. The adoption of the rulemaking will be the end of discussions, and the horrible consequences will be abandoned cemeteries across the State. I want to place on record JCAR's concerns regarding the rulemaking in the form of an Objection.

Senator Harmon moved, seconded by Senator Righter, that JCAR object to the rulemaking of the Department of Financial and Professional Regulation titled Cemetery Oversight Act (68 Ill. Adm. Code 1249; 35 Ill. Reg. 11050) because licensure fees, indemnification costs and continuing education requirements, as well as cemetery maintenance standards that are not differentiated based on the size and financial strength of the cemetery as is required by the statute, will create a serious financial hardship for some cemeteries. Further, the Department is acting prematurely in urging the adoption of these rules while legislation is pending before the General Assembly that would offer the Department additional direction on the implementation of the Cemetery Oversight Act.

Co-Chair Saviano: After meeting in October 2010, Secretary Adams stated that the statute was flawed, and, as a result, unflawed rules could not be written to remedy the deficiencies. I expressed hope that the deficiencies could be addressed in trailer legislation. However, trailer legislation did not pass. Instead, a second set of flawed rules was presented without curing the legislative deficiencies, bringing the situation back to square one. Another reason for asking for the Extension relates to the influx of public comment on this rulemaking. JCAR members need additional time to address those concerns. DFPR's refusal to agree to the Extension prevents

JCAR from doing its job. JCAR acts in a bipartisan fashion. In my 3 years as co-chair of JCAR, this is the first time that a consensus has not been reached, and I believe that politics is the reason. One caucus is trying to control this process and the Secretary is perpetuating abusive practices being employed by that caucus, in light of legislation passed to protect against those abuses. I strongly recommend agreeing to the Extension. I have had a positive relationship with DFPR, and I urge the Department to change its mind and prevent a very dangerous precedent from being set. I urge Secretary Adams to shed whatever outside influences may be preventing DFPR from agreeing to the Extension, stand up and be a man, and agree to the Extension so that you can walk out of the meeting with your head up knowing that you did not succumb to a political reason for stymieing JCAR from finishing its work. I strongly urge the Secretary, and urge DFPR-DPR Director Jay Stewart to convince Secretary Adams, to agree to the Extension. This is not an issue with which to play hardball. A solution can be reached that will grant people a comfort level in complying with the law and protecting the constituents.

Co-Chair Crotty: I thank the Secretary for allowing the General Assembly nearly a 2 year span to come up with trailer legislation to remedy the deficiencies in a flawed statute that was passed by the House and the Senate and signed by the Governor. This is a law. Legislators gave assurances that a trailer bill would be passed to correct issues that remained in flawed legislation. The legislature did not do that. It is not the Secretary's fault that he is before us trying to follow a law that was passed and signed by the Governor. I hope that the legislature will present another trailer bill. I thank the Secretary for being so attentive to the affected public's concerns throughout the process and specifically during the October 2010 meetings.

Representative Mulligan: Once rules are established, an entitlement program exists, and we become open to lawsuits because people expect that is what is going to happen and that is how things are going to be. It would not be a good idea for rules to move forward that would create an entitlement program until we can figure out what we are doing. It is not fair to make an entitlement program for this particular area.

Representative Thapedi: Would implementation of the rules today in any way impede or prohibit legislation in the future on this particular issue?

Secretary Adams: No. It would better contextualize the legislation because a more practical piece of law would take effect instead of an abstract piece of law that has not taken effect.

Senator Righter: Please elaborate.

Secretary Adams: Because the Act has not taken effect in any meaningful way and there has been no licensure of any kind, it is only speculative at this point as to what exactly needs to be fixed with respect to the licensure components of the Act.

Senator Righter: Does this mean that people need to feel the bite, that the people who will be affected by this legislation need to actually get hit with the regulation? Then they need to scream louder to the lawmakers in order for people to understand exactly what the Cemetery Oversight Act means?

Secretary Adams: No. Individuals and cemeteries that are fearful of licensure because they are not accustomed to being licensed will become licensed and will realize it is not as fearful as they once thought.

Senator Righter: Is this what the Secretary believes will happen?

Secretary Adams: This is the Department's goal.

Senator Righter: Do you truly believe this will be the effect across the State on the smaller cemeteries, particularly the privately owned cemeteries?

Secretary Adams: I hope this will occur. I speak at cemetery conventions and spend an inordinate amount of time with this industry trying to address cemeterians' concerns regarding the unknowns related to licensure, continuing education, etc. The one actual experience that DFPR has had pertains to the Cemetery Oversight Database. It has been profoundly successful because cemeteries that were afraid to use the database, afraid of technology, are now thankful to have electronic records to replace their paper records. This is a perfect example of how the reality of the licensure Act is much better than the fear of the unknown.

Senator Righter: So the hundreds of constituents reaching out to me and other members of JCAR complaining about needless government regulation are simply running from the unknown and don't know what they are talking about?

Secretary Adams: I cannot make a blanket statement about the constituents that have contacted the Senator. A helpline exists to assuage concerns about regulation and answer any questions the industry may have. DFPR relishes the opportunity to address those concerns.

Senator Righter: What will the Secretary do with the comment letters I received from the affected public if I send them to you?

Secretary Adams: It depends on the concern stated. DFPR would be happy to try to address those concerns.

The motion passed on a rollcall vote of 6-4-0 (yes – Harmon, Jones, Righter, Moffitt, Mulligan, Saviano; no – Crotty, Silverstein, Harris, Thapedi; not present – Althoff, Lang).

### **CERTIFICATION OF NO OBJECTION**

Senator Crotty moved, seconded by Representative Thapedi, that the Committee inform the agencies to whose rulemakings the Committee did not vote an Objection or an Extension, or did not remove from the No Objection List, that the Committee considered their respective rulemakings at the monthly meeting and, based upon the Agreements for modification of the rulemakings made by the agencies, no Objections will be issued. The motion passed unanimously.

### **EXPEDITED CORRECTION**

*Department of Public Health – Skilled Nursing and Intermediate Care Facilities Code (77 Ill. Adm. Code 300; 35 Ill. Reg. 15308)*

Senator Jones moved, seconded by Representative Moffitt, that the Committee approve and certify DPH's request for an Expedited Correction of this rulemaking that was adopted, effective 6/29/11, in the 7/15/11 *Illinois Register* (35 Ill. Reg. 11419). The effective date of the correction is 6/29/11. The motion passed unanimously.

### **OCTOBER MEETING DATE**

Co-Chair Saviano announced that the next monthly meeting is scheduled for Tuesday, November 8, 2011 tentatively at 9:00 a.m. in Room D-1, Stratton Office Building, Springfield IL.

### **ADJOURNMENT**

Senator Harmon moved, seconded by Senator Crotty, that the meeting stand adjourned. The motion passed unanimously.

*Min:1110Oct*